COCOA PROCESSORS SDN. BHD.

v.

UNITED MALAYAN BANKING CORP. BHD. & ORS.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[HIGH COURT NO. 23-102-87]
16 MAY 1988

CIVIL PROCEDURE: *Erinford injunction - Pending appeal - Principles applicable for grant of - Success of appeal - Preservation of status quo - Balance of convenience - Whether damages is an adequate remedy.*

The plaintiff owed the 1st and 2nd defendants quite a substantial sum of money secured by a debenture. Upon default of the plaintiff, the 3rd to 6th defendants were appointed receivers and managers of the properties and assets of the plaintiff by the 1st and 2nd defendants as per their powers under the debenture.

In this action the plaintiff claimed for damages for wrongful appointment of the receivers and managers. The plaintiff had obtained an *ex parte* injunction restraining the defendants from disposing, selling and dealing with its assets pending trial of this action. This *ex parte* injunction was subsequently set aside upon the application of the defendants - one of the reasons was that the Court had found that there was no serious question to be tried on the pleadings as the receivers and managers were validly appointed. The plaintiff's appeal to the Supreme Court against the setting aside of the injunction had yet to be heard.

Pending the appeal, the plaintiff applied to the Court for a further limited interim injunction of the same nature as the one the plaintiff originally obtained pending appeal or otherwise called the Erinford injunction.

The application for the Erinford injunction was made orally just after the judgment allowing the setting aside was allowed and this decision deals with the said application for the Erinford injunction.

The plaintiff submitted that the Erinford injunction should be granted for the following reasons:

(i) that the *status quo* should be preserved pending appeal;

(ii) that under the Erinford principle, when a party is appealing, exercising its undoubted right of appeal, the Court ought to see that the appeal if successful is not nugatory;

(iii) that a likelihood for a successful appeal being rendered nugatory was a sufficient ground;

(iv) the 3rd to 6th defendants, i.e. the receivers would not be prejudiced by the Erinford order;

(v) the 1st and 2nd defendants had a registered charge over the parties of the plaintiff; and

(vi) no greater hardship would be rendered to the defendants if the Erinford injunction is granted.

The defendant's submitted:

(i) that the Erinford injunction should not be granted if damages is a suitable alternative, as in the present case;

(ii) the said assets were depreciating in value;

(iii) as the appeal would take time before it is heard, the prejudice to the 1st and 2nd defendants would far outweigh the inconvenience of the plaintiff; and

(iv) the plaintiff has failed to show in what way, if the appeal is successful would render the judgment nugatory.

Held:

[1] The principles on which a Court should act when deciding whether or not to allow an application granting an injunction pending on appeal is set out by Megarry J in *Erinford Properties v. Cheshire County Council* one of the factors being, was the possibility that the judgment of the Court be reversed or varied.

[2] Having considered the whole position of the case, the Court was of the view that whether or not the plaintiff succeeds in the appeal and in the main action will not be affected by its failure to obtain this further interim injunction as the plaintiffs claim is for damages for wrongful appointment of receivers and managers.

[3] The 1st and 2nd defendants being a commercial and merchant bank respectively will no doubt satisfy any money judgment ordered by the Court and there is therefore no likelihood of a successful appeal against the Court's decision being rendered nugatory.

[4] Based on the facts and circumstances of the present case, the Court found that the balance of convenience lay in favour of the injunction pending appeal being refused. Therefore damages seemed to be a suitable and adequate remedy as the plaintiff would be adequately compensated in damages for the temporary damage between now and the date when its appeal is heard if the Court's decision is reversed by the Supreme Court.

[Application for limited interim injunction dismissed pending appeal with costs.]

Cases referred to:

Erinford Properties v. Cheshire County Council [1974] 1 Ch. 261; [1974] 2 All ER 448 Wilson V. Ehwel (No. 2) 12 Ch.D. 454 Orion WLR 1085

For the plaintiff - Charles Ong; M/s. Jayaraman, Ong & Co. (K. Balasundaram of M/s. Balasundaram & Co. with him)
For the 1st defendant - T. Thomas (Tunku Alina with him); M/s. Skrine & Co.
For the 2nd defendant - Juliana Solomon; M/s. Rashid & Lee
For the 3rd, 4th, 5th & 6th defendants - Ghazi bin Ishak; M/s. Presgrave & Matthews

JUDGMENT

Mohamed Dzaiddin J:

On 29 September 1987 and 22 February 1988 I heard submissions of Counsel for the defendants on their application to dissolve the *ex parte* interim injunction which I granted against all the defendants on 3 April 1987 restraining them from disposing, selling, dealing etc. with the assets of the plaintiff's company through the 3rd, 4th, 5th and 6th defendants who were appointed receivers and managers under the debentures. On 15 April 1988 I delivered my judgment allowing the defendants' application with costs.

Immediately thereafter, Mr. Charles Ong, Counsel for the plaintiff, upon his undertaking to file the notice of appeal against my above decision to the Supreme Court, moved orally for a further limited interim injunction pending the hearing of the appeal. Counsel stated that he

was making the application under the principles in *Erinford Properties v. Cheshire County Council* [1974] 1 Ch. 261; [1974] 2 All ER 448. Quite naturally, Encik Ghazi who appeared for the defendants opposed the application. On 30 April 1988, I heard the arguments of Counsel.

Mr. Balasundaram, who appeared with Mr. Charles Ong, submitted that I should exercise my discretion in allowing a further interim injunction pending an appeal for the following reasons. He stated that the concern of the plaintiff was to preserve the *status quo* pending the hearing of an appeal against my judgment, the notice of appeal had already been filed. Under the Erinford principle, when a party is appealing, exercising his undoubted right of appeal, the Court ought to see that the appeal if successful is not nugatory. Undoubtedly, Counsel was conscious of my strong reasons for dissolving the *ex parte* interim injunction. Nevertheless, he felt that the likelihood of a successful appeal being rendered nugatory was a sufficient ground for me to grant the plaintiff's application. Counsel further submitted that the receivers would not be prejudiced by the interim injunction and in addition, the 1st and 2nd defendants had a registered charge over the properties of the plaintiff. Lastly, he felt there would be no greater hardship rendered to the defendants if the present application was allowed.

Tunku Alina, Miss Solomon, and Encik Ghazi, in opposing the application, submitted mainly on the question of damages and balance of convenience i.e. graver hardship to the defendants. Tunku Alina submitted that *Erinford* was not a case in which damages seemed to be a suitable alternative unlike the present case. Miss Solomon submitted that since the appointment of the receivers and managers, the assets of the plaintiff company have depreciated considerably. The value of the plaintiff's factory and assets as a going concern as at 9 April 1985 was RM10 million. But on the day the receivers and managers were appointed i.e. 24 April 1986, it was valued at RM4.5 million. On the question of the balance of convenience, both Tunku Alina and Miss Solomon submitted that as the appeal may take about six months before it is heard, the prejudice to the 1st and 2nd defendants would far outweigh the convenience of the plaintiff. Lastly, Encik Ghazi submitted that the plaintiff had failed to show in what way, if the appeal is successful, it would render the judgment nugatory.

In *Erinford*, (reading from the headnote) on the plaintiffs' motion for an interlocutory injunction restraining the defendant from considering or determining the plaintiffs' planning application for certain land otherwise than concurrently with another planning application for adjoining land made by the other applicants, judgment was given refusing the injunction. Immediately after the judgment the plaintiffs moved the Court *ex parte* for, and were, granted, an injunction in a modified form restraining the defendant from considering the plaintiffs' planning application for some six days in order to enable the plaintiffs to consider an appeal. The defendant moved the Court *ex parte* to discharge the injunction. Megarry J, in dismissing the motion, held that the Court had jurisdiction to grant the injunction and that it was not inconsistent with a decision refusing an interlocutory injunction for the Court subsequently to grant a more limited injunction preserving the *status quo* pending an appeal against that refusal. At p. 268 Megarry J set out the principles on which a Court should act when deciding whether or not to allow an application granting an injunction pending an appeal:

> There will, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on. But subject to that, the principle is to be found in the leading judgment of Cotton LJ in *Wilson v. Church* (No. 2) 12 Ch. D. 454, where, speaking of an appeal from the Court of Appeal to the House of Lords, he said, at p. 458, "... when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory." That was the principle which Pennycuick J applied in the *Orion* case 1 WLR 1085; and although the cases had not then

been cited to me, it was on that principle, and not because I felt any real doubts about my judgment on the motion, that I granted Mr. Newsom the limited injunction pending appeal that he sought. This is not a case in which damages seem to me to be a suitable alternative.

Let me first highlight some salient points of the present case which may assist me in the exercise of my discretion. The plaintiff owed the 1st and 2nd defendants a substantial sum of money secured by the debentures. Upon its failure to pay all the outstanding, the 1st and 2nd defendants proceeded to appoint receivers and managers over the properties and assets charged under the debentures. The plaintiff then commenced a civil suit against the defendants claiming damages for wrongful appointment of receivers and managers under the debentures. At the same time, it applied for an *ex parte* interim injunction, which was granted but later dissolved restraining the defendants from disposing, selling and dealing with its assets pending the hearing of the civil suit. In my written grounds of decision in dissolving the *ex parte* interim injunction I stated, *inter alia*, quite clearly that there was no serious question to be tried on the pleading. I held that the receivers and managers were validly appointed. My decision is now pending appeal. Megarry J in *Erinford* recognised that one of the factors in granting the application was the possibility that the judgment might be reversed or varied. I agree that this is an important factor in favour of the plaintiff. On the other hand, there are other consideration e.g. "where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on." Therefore, considering the submissions of Counsel from the point of view of the Erinford principles, I find merits in the defendants' objection. Having considered the whole position of the case, I am of the view that whether or not the plaintiff succeeds in the appeal and in the main action will not be affected by its failure to obtain this further interim injunction. It must be remembered that the plaintiff's claim against the defendants is for damages for wrongful appointment of receivers and managers. The 1st and 2nd defendants being a commercial and merchant bank respectively will no doubt satisfy any money judgment ordered by the Court. Therefore, responding to Mr. Bala's fear and anxiety on behalf of the plaintiff, I must say quite confidently that there is no likelihood of a successful appeal against my decision being rendered nugatory.

Secondly, a more serious issue to be considered here is the balance of convenience. Based on the facts and circumstances of the present case, I find the balance of convenience lay in favour of the injunction pending appeal being refused. I accept the submission of Miss Solomon that the assets of the plaintiff company had depreciated and the longer it remains in its present position, the greater the hardship being inflicted on the defendants. Further, in the event the plaintiff's claim being dismissed, the assets having been depreciated quite considerably, the defendants may not be able to reap the fruits of their success under the debentures. On the other hand, should the plaintiff succeed in its claim ultimately, for damages, the defendants will have no difficulty in settling the judgment.

Lastly, I agree with Tunku Alina that in the present case damages seem to be a suitable and adequate remedy. The plaintiff would be adequately compensated in damages for the temporary damage between now and the date when its appeal is heard if my decision is reversed by the Supreme Court.

For the above reasons, I dismiss the plaintiff's application for a limited interim injunction pending appeal with costs.

Also found at [1989] 1 CLJ 183